

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6860

Petitions of Vermont Electric Power Company, Inc.)
(VELCO), Vermont Transco, LLC, Green Mountain Power)
Corporation (GMP), and Central Vermont Public Service)
Corporation (CVPS) for a certificate of public good,)
pursuant to 30 V.S.A. Section 248, authorizing VELCO to)
construct the so-called Northwest Vermont Reliability)
Project, said project to include: (1) upgrades at 12 existing)
VELCO and GMP substations located in Charlotte, Essex,)
Hartford, New Haven, North Ferrisburgh, Poultney,)
Shelburne, South Burlington, Vergennes, West Rutland,)
Williamstown, and Williston, Vermont; (2) the construction)
of a new 345 kV transmission line from West Rutland to)
New Haven; (3) the reconstruction of a portion of a 34.5 kV)
and 46 kV transmission line from New Haven to South)
Burlington; and (4) the reconductoring of a 115 kV)
transmission line from Williamstown to Barre, Vermont)

Order entered: 8/19/2009

ORDER RE HERBICIDE USE WITHIN WETLAND BUFFERS

Introduction

This Order addresses the use of herbicides on the Northwest Vermont Reliability Project (the "Project") by Vermont Electric Power Company, Inc. and Vermont Transco LLC (collectively, "VELCO") within the buffer zones of wetlands that contain standing water. For the reasons set forth below, the Public Service Board ("Board") concludes that such application of herbicides is not allowed under the Order and Certificate of Public Good ("CPG") in which the Board approved the Project.

Background

Final Order and CPG

On January 28, 2005, the Board issued an Order and CPG approving, with conditions, the Northwest Vermont Reliability Project. The January 28 Order included the following findings concerning herbicide use in wetlands:

462. Vermont's Pesticide Advisory Council does not allow VELCO to apply herbicides within 30 feet of surface waters, but VELCO is allowed to apply herbicides within wetlands without surface water. Rowe/Disorda/Gilamn[sic]/Briggs reb. pf. at 6–7.

463. Herbicides should not be applied within the buffer of any wetland that contains standing water. Tr. 6/16/04 (Vol. I) at 22 (Quackenbush); exh. Towns Cross 270.

464. The Vermont Wetlands Rules establish buffer zones around Class I and Class II wetlands. The purpose of the buffer zones is "to protect those functions that make a wetland significant." For a Class II wetland, a fifty foot buffer zone is established contiguous to the boundaries of the wetland, unless a buffer zone specific to a particular wetland is established by the Water Resources Board. Vermont Wetlands Rule, as adopted December 10, 2001, Section 4.3.¹

In the Order, those findings are followed by a Discussion that reads:

Shelburne and Charlotte argue in their briefs that VELCO should be prohibited from applying herbicides within the buffer zones of any wetlands that contain standing water. VELCO objects to this proposed requirement, relying on the Pesticide Advisory Council's determination that VELCO may apply herbicides within the buffer zones of such wetlands.

We conclude that prohibiting use of herbicides within the buffer zone of wetlands with surface water is justified. The proposed Project will impact hundreds of wetlands and the additional protection that will be afforded to a portion of these wetlands (those with standing water), will help in balancing the cumulative impact of the proposed Project. Requiring more stringent standards that the Pesticide Advisory Council will provide an environmental benefit without causing any meaningful (or perhaps even measurable) economic impact.²

The January 28, 2005, Order and the CPG each contain the following condition:

"Construction, operation, and maintenance of the proposed Project shall be in accordance with the findings and requirements set forth in the Order."³

On July 31, 2007, VELCO filed a Motion for Clarification in which it requested that the Board clarify that under the January 28 Order, "VELCO is authorized to apply herbicides in the manner stated in its herbicide use permit issued on May 3, 2007, by the Vermont Agency of

1. Order issued 1/28/05 at 154.

2. *Id.* at 155.

3. *Id.* at 227 (Condition 6); CPG issued 1/28/05 at 2 (Condition 5).

Agriculture."⁴ VELCO further requested, in the alternative, that "if the Board intended to impose a different restriction than VELCO's permits, the Board intended to impose a restriction limiting herbicide application within 50 feet of standing water" On September 7, 2007, the Board denied VELCO's motion.

Recent filings regarding herbicide use

On May 8, 2009, a number of Charlotte residents submitted a letter to the Board regarding VELCO's use of herbicides at substations that were reviewed in this docket, including the Charlotte substation. On May 12, 2009, the Board issued a memorandum asking for responses to the residents' letter from VELCO, the Agency of Natural Resources ("ANR"), and any other party that wished to respond.

VELCO filed its response on June 2, 2009. In the June 2 filing, VELCO states:

. . . herbicides are applied neither directly nor indirectly in any undisturbed Class Two wetland buffer zones. For example, at the Blissville Substation, the only NRP substation with constant standing water within fifty feet, VELCO intends to apply herbicides on an annual basis only within the developed footprint of the substation site.⁵

Also on June 2, ANR filed comments in which it claims that it "is unaware of any herbicide applications at substations located within wetland buffers that contain standing water. Furthermore, ANR believes that such applications are inconsistent with the plain language of Finding 463."⁶

On June 3, 2009, the Town of Charlotte ("Charlotte") filed comments in which it supported Board clarification of the requirements regarding the use of herbicides at substations and consideration of alternatives to herbicide use.

On June 17, 2009, the Board issued a memorandum asking VELCO to clarify its June 2 response with respect to "whether, at any of the Northwest Vermont Reliability Project

4. VELCO Motion for Clarification at 1.

5. Letter dated June 2, 2009, from S. Mark Sciarrotta, Esq., to Susan M. Hudson, Clerk of the Board, at 2.

6. Letter dated June 2, 2009, from Michael Steeves, Esq., to Susan M. Hudson, Clerk of the Board, at 1.

substations, it uses or intends to use herbicides within the buffer of a wetland that contains standing water, including buffer areas that are within the developed footprint of a substation."⁷

On June 26, 2009, VELCO filed a response stating that it "has ascertained that the Blissville Substation, which lies within the buffer zone of a wetland with standing water, has received herbicide treatments in 2007 and 2008, although no herbicides have been applied in 2009."⁸ VELCO maintains that these applications of herbicides at the Blissville Substation were consistent with Finding 463 of the January 28, 2005, Order in this docket. While VELCO acknowledges that a plain-language reading of Finding 463 would support a strict prohibition on herbicide application within the buffer of a wetland with standing water, it maintains that such an interpretation is wrong for two reasons. First, according to VELCO, a strict prohibition would jeopardize worker safety and system reliability. Second, VELCO asserts that the Board's January 28, 2005, Order and the subsequent September 7, 2007, Order in response to a VELCO motion for clarification, were focused on line maintenance, not substations. VELCO contends that "[t]he particular consequences of a strict interpretation of Finding 463 with respect to substation maintenance were not, and could not have been anticipated based on information available to the Board and the parties at the time."⁹

VELCO asks for a Board ruling that its application of herbicides in substations is consistent with the intent of Finding 463. In the alternative, VELCO asks for a thirty-day period in which to file a motion to amend the Order.

On July 10, 2009, responses to VELCO's June 26 filing were submitted by ANR and Charlotte.¹⁰ ANR states that:

While ANR stands by its June 2, 2009 filing, ANR recognizes the safety issues associated with non-herbicide treatment methods within substations. To the extent that the Board deems VELCO's actions consistent with Finding 463, ANR

7. Memorandum dated June 17, 2009, from Susan M. Hudson, Clerk of the Board, to parties in Docket No. 6860.

8. Letter dated June 26, 2009, from S. Mark Sciarrotta, Esq., to Susan M. Hudson, Clerk of the Board, at 1.

9. *Id.* at 3.

10. The "Lynrick Acres Extended Neighborhood," which is not a formal party, also filed comments in which it responds to VELCO's submittal and requests additional restrictions on the use of herbicides.

has not identified any off-site impacts from VELCO's herbicide application and is satisfied with VELCO's monitoring plan.¹¹

ANR's letter represented that the Department of Public Service concurs in the ANR comments.

Charlotte states that it does not know whether the safety and reliability concerns expressed by VELCO are legitimate, but contends that those concerns are not supported by the existing record. Charlotte indicates that it "has no interest in advancing its interests in wetland protection at the expense of legitimate worker safety concerns," but that the Board should "carefully examine VELCO's contentions in light of the Board's prior determinations in this case regarding the use of herbicides in wetland buffers."¹²

Discussion and Conclusions

The January 28, 2005, Order and CPG unambiguously prohibit the application of herbicides within the buffer zone of a wetland containing standing water. VELCO acknowledges that it has engaged in such herbicide application at the Blissville substation, but contends that this herbicide use should be viewed as consistent with the intent of Finding 463 due to alleged worker safety and reliability concerns.

We cannot accept VELCO's claim that its herbicide application in contravention of the clear language of the January 28, 2005, Order and CPG can be construed as consistent with the intent of Finding 463. As Charlotte correctly notes, the worker-safety and system-reliability concerns expressed by VELCO are not supported by the existing record. Thus, there is no basis for concluding that our intent in January 2005 was to allow herbicide use within wetland buffers for the purpose of mitigating safety and reliability concerns. Instead, we conclude that, at a Project substation, the application of herbicides within the buffer zone of a wetland that contains standing water is not allowed under the January 28, 2005, Order and CPG.

We wish to be absolutely clear, however, that it is not our intent to jeopardize worker safety or system reliability. If, as VELCO asserts, those are the consequences of a strict

11. Letter dated July 10, 2009, from Michael Steeves, Esq., to Susan M. Hudson, Clerk of the Board, at 1.

12. Letter dated July 10, 2009, from Joseph McLean, Esq., to Susan M. Hudson, Clerk of the Board, at 1.

prohibition on herbicide use within the buffer zones of wetlands with standing water, then the proper course is for VELCO to file for a modification to the herbicide restrictions, with information supporting the requested modification.

VELCO has requested a thirty-day period to submit such a filing. We grant VELCO's request; therefore, if VELCO wishes to seek a modification of the restrictions on herbicide application within wetland buffers, it shall file a properly supported request by September 18, 2009. If VELCO submits such a request, responses shall be due three weeks after the request is filed. Any requests for a hearing should be included in these filings.

In addition, the Board is requesting comment on whether sanctions are appropriate if pesticides were applied at the Blissville substation in violation of the Board's January 28 Order. Such comments should be filed at the time parties file responses to VELCO's request to modify restrictions on herbicide application within wetland buffers; if VELCO does not file such a request, comments shall be due by October 9, 2009.

SO ORDERED.

Dated at Montpelier, Vermont, this 19th day of August, 2009.

_____)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: August 19, 2009

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)